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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 MICHAEL PHILIP KAUFMAN,

4 Plaintiff,

5 v.

16 Cv. 2880 (AKH)

6 MICROSOFT CORPORATION,

7 Defendant.

8 -----x
9 New York, N.Y.

January 16, 2020

11:00 a.m.

10
11 Before:

12 HON. ALVIN K. HELLERSTEIN,

13 District Judge

14 APPEARANCES

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(Case called)

THE DEPUTY CLERK: Counsel, please state your appearances for the record.

MR. ABRAMSON: Ronald Abramson, of Liston & Abramson LLP, for the plaintiff, Michael Philip Kaufman, and with me are Ari Jaffess and Alex Patchen of my firm.

THE COURT: And you are?

MR. KAUFMAN: Michael Kaufman.

THE COURT: OK. For the defendant.

MR. DAVIS: Good morning again, your Honor. My name is Ahmed Davis, from the law firm of Fish & Richardson, on behalf of Microsoft. I have here with me my colleagues Jason Wolff, Leah Edelman, and Excylyn Hardin-Smith.

THE COURT: Thank you very much.

We will begin by doing the motion and it's defendant's motion. So Mr. Davis.

MR. DAVIS: Thank you, your Honor. We have actually split the argument up into three parts. So Mr. Wolff is going to handle the summary judgment of noninfringement, Ms. Edelman will handle the argument with respect to Schemalive, and Ms. Hardin-Smith will handle the argument with respect to willfulness.

THE COURT: Go ahead.

MR. WOLFF: Thank you, your Honor.

THE COURT: Mr. Wolff, one of the first things about a

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1 litigator is to speak loudly and clearly.

2 MR. WOLFF: I will do my best, your Honor.

3 I am going to handle the noninfringement summary
4 judgment motion. That's Docket No. 111. My colleagues will
5 handle the other parts of it, as Mr. Davis had mentioned.

6 If I could start by refreshing your Honor what this
7 case is about. It's about software that is used by people to
8 access databases. And there's two parts to this software that
9 kind of matter for the summary judgment motion. One is what
10 happens when you write code for these computer applications.
11 And the second is what happens when you run the code for the
12 computer applications, in other words, what the user might see.

13 If anything should be apparent to your Honor from the
14 briefing, it's that there is a claim construction dispute
15 between the parties. This is a legal issue that needs to be
16 resolved before trial under *02 Micro*, that's 521 F.3d 1341,
17 cited in the briefs. And the reason it needs to be resolved is
18 because it will simplify the presentation of evidence to the
19 jury, it will reduce juror confusion, and it will align the
20 prosecution and defense of the claims between the parties, and
21 it will void issues for appeal.

22 Now, Microsoft's noninfringement motion depends on two
23 claim construction issues. And under either one, Microsoft
24 contends Mr. Kaufman has not shown that there is a genuine
25 issue of triable fact that would warrant having a trial, and

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1 that if either is decided in Microsoft's favor, summary
2 judgment should be granted.

3 Now, how did we get here? As the case progressed, Mr.
4 Kaufman's infringement theory changed. In his Local Patent
5 Rule 6 disclosures, which were Docket No. 33, he identified
6 Microsoft ASP.NET Dynamic Data as the alleged infringing
7 product.

8 Now, as discovery progressed, and we received Mr.
9 Kaufman's expert report from Dr. Dennis Shasha, he changed that
10 theory. He changed that theory and acknowledged in a sense
11 that the scanning limitation was not performed by the accused
12 product, Microsoft ASP.NET Dynamic Data. And what he did is he
13 changed that theory to say that, when a person uses some other
14 software, Visual Studio, and invokes another special tool
15 called an Object Relational Mapper, that now the scanning
16 limitation is satisfied.

17 He never supplemented his local patent rule
18 disclosures. He never told us he was changing the theory. So
19 now we are with a claim construction dispute where the two
20 sides have fundamentally differing views on what the claims
21 mean. The first is the scanning limitation, and the second is
22 a limitation found in claim C, or subpart C of the claims,
23 which refers to integrating into each of the mode's display
24 processes for representing, navigating, and managing records
25 across tables.

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1 So let me first address the scanning limitation. Mr.
2 Kaufman's expert has two constructions, one for validity and
3 another for infringement. If you have at your disposal, and I
4 can hand it to you if it would help, Docket No. 113-14, this is
5 Exhibit N to the summary judgment motion. Would your Honor
6 like a copy?

7 THE COURT: Just talk. If I want it I can get it.

8 MR. WOLFF: OK. If we turn to this, this is Dr.
9 Shasha's invalidity report, or a rebuttal to Microsoft's
10 invalidity report. He explains on paragraph 57 -- and this is
11 at ECF page 7 of 24 -- that human effort in the prior art is
12 required to build applications. And that is not permitted
13 under his claims.

14 At paragraph 58, he expressly says what the word
15 automatic means. And he says that automatic means --

16 THE COURT: Are you building to an argument that
17 Microsoft's process is not automatic, entirely automatic, and
18 therefore not an infringement, is that the point?

19 MR. WOLFF: Yes, your Honor.

20 THE COURT: How do I know that without having your
21 process proved and displayed?

22 MR. WOLFF: We can look at the papers that were
23 submitted in the summary judgment, Mr. Kaufman's expert's
24 report, where he walks through the manual steps that the
25 developer must do in order to perform the scanning limitation.

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1 He says the same thing in paragraph 61, that the prior
2 art requires human effort, and that's not permitted by his
3 claims. The same thing again in paragraph 64 and 86 and 89. I
4 won't recount all the things he said. You have the papers in
5 front of you.

6 THE COURT: What ECF number is this?

7 MR. WOLFF: 113-14. And the clearest example, as I
8 mentioned before, is paragraph 58.

9 THE COURT: Exhibit N?

10 MR. WOLFF: Yes, your Honor. I'm sorry. Paragraphs
11 55 and 58 make the exact same statement, which is that
12 automatic --

13 THE COURT: You want me to go from 55 to 58.

14 MR. WOLFF: Yes. And it's the last sentence in
15 paragraph 55. And it concludes "automatic," and in parentheses
16 "meaning no human labor required."

17 He says the same thing in paragraph 58, and throughout
18 the report he says pretty much the same thing.

19 Now, in Dr. Shasha's infringement report --

20 THE COURT: That's what I am looking at.

21 MR. WOLFF: Exhibit N is his rebuttal report on
22 invalidity.

23 THE COURT: Dr. Shasha's paragraph 55 begins with
24 Mr. McGoveran, is that right?

25 MR. WOLFF: Yes.

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1 THE COURT: And what is it in that paragraph 55 that
2 you want to bring to my attention?

3 MR. WOLFF: The last clause in the paragraph, where he
4 explains that Microsoft's expert is conflating no programming
5 with automatic, meaning no human labor required. And he is
6 saying that automatic does not allow human labor.

7 So this is his response to Microsoft's prior art that
8 it put in the case.

9 THE COURT: Why are we talking about prior art? We
10 are talking about infringement, aren't we?

11 MR. WOLFF: We are. The point I am making is that
12 there is a claim construction dispute, and Mr. Kaufman's expert
13 has two constructions for automatically generating and how that
14 relates to the scanning limitation.

15 THE COURT: I was asked to define automatic, wasn't I?

16 MR. WOLFF: You were, your Honor, in the original
17 briefing.

18 And if I may --

19 THE COURT: One minute.

20 MR. WOLFF: The parties withdrew the request for the
21 construction, and this is before Mr. Kaufman changed his
22 infringement theory.

23 THE COURT: Well, I didn't define automatic. I
24 defined only that which was in dispute.

25 MR. WOLFF: Correct. And the parties submitted a

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1 paper to your Honor, at Docket No. 62, where they said that
2 they seemed to agree on what the meaning of this term was. I
3 have that if you would like it. I could hand it to your Honor.

4 THE COURT: What was your agreement?

5 MR. WOLFF: Well, the agreement specified in there,
6 Microsoft said just what it said here, which is that automatic,
7 as it's used in the claims and applied to the scanning
8 limitation, means that no separate developer input occurs.

9 THE COURT: Is that satisfactory to the plaintiff?

10 MR. WOLFF: I don't know.

11 THE COURT: I am asking the plaintiff.

12 Is it satisfactory to you, Mr. Abramson?

13 MR. ABRAMSON: Your Honor, could you repeat that,
14 please?

15 THE COURT: No separate developer input occurs.

16 MR. ABRAMSON: Your Honor, we have to be careful about
17 what is the subject matter of that, but for the actual scanning
18 limitation itself, we agree. We agree. The actual scanning
19 operation itself, we agree.

20 THE COURT: Go ahead. Proceed.

21 MR. WOLFF: Mr. Abramson is qualifying the agreement.
22 But the point that Mr. Kaufman's expert made in the rebuttal
23 report on invalidity was that no human effort could occur,
24 which is essentially the same thing as no separate developer
25 input occurs. It precludes the developer from doing anything,

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1 from clicking on menus, from doing pull-downs, and writing
2 code.

3 THE COURT: And your position is that there is some
4 developer input.

5 MR. WOLFF: Exactly, your Honor.

6 THE COURT: How do you prove that?

7 MR. WOLFF: How I prove that is that I turn to Exhibit
8 C, which is Docket No. 113-3, and this is Dr. Shasha's
9 infringement report, and at paragraphs 37 through 50, he
10 illustrates all the developer input, or most of it, that he had
11 to do to generate one of these programs.

12 And if you will turn to paragraph 37, and this is at
13 page 5 of 17, Docket 117-3.

14 THE COURT: It shows what happens when Visual Studio
15 is opened.

16 MR. WOLFF: Correct. Visual Studio is not the alleged
17 infringing product.

18 And from this, in paragraph 38 --

19 THE COURT: Visual Studio is not what?

20 MR. WOLFF: Is not the alleged infringing product.

21 THE COURT: How do you prove that you have human
22 involvement, that there is separate developer input?

23 MR. WOLFF: By stepping through the steps that he
24 illustrated in this report. And if you could indulge me, I can
25 walk you through each one of these so you can see what is

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1 happening.

2 THE COURT: Go ahead.

3 MR. WOLFF: At paragraph 38, he shows that the
4 developer has to create a new project. And here he said that
5 you had to specify it by using a mouse and clicking on ASP.NET
6 Dynamic Data entity's website, and then you would click on the
7 OK button at the bottom of the screen capture.

8 The next thing you would have to do is shown at
9 paragraph 39. Here, he shows that the developer needs to add a
10 relational database to the project.

11 THE COURT: He says the selection in this case, and
12 that goes back to the previous selection.

13 MR. WOLFF: Right. He is identifying some of the code
14 that gets generated.

15 THE COURT: Where is that?

16 MR. WOLFF: It's at the last clause at the sentence on
17 paragraph 39.

18 THE COURT: So that ASP.NET Dynamic Data entity's
19 website appears on the screen third from the bottom.

20 So you are saying that the developer has to check
21 that, he has to click on that?

22 MR. WOLFF: Are you referring to paragraph 38?

23 THE COURT: Yes.

24 MR. WOLFF: Yes, your Honor.

25 THE COURT: The developer would double click that?

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1 MR. WOLFF: Correct.

2 THE COURT: Is it your contention that shows human
3 involvement?

4 MR. WOLFF: It does, your Honor.

5 THE COURT: So that in itself contradicts automatic.

6 MR. WOLFF: Correct.

7 THE COURT: And that's why you think you're not
8 infringing.

9 MR. WOLFF: It's not the only reason.

10 THE COURT: It's one reason.

11 MR. WOLFF: It's one. If we get to the other
12 paragraphs, I can show you where he identifies the scanning
13 limitation being performed.

14 THE COURT: Go ahead.

15 MR. WOLFF: So after the developer has clicked on this
16 project, and here Dr. Shasha's shows in paragraph 40 the
17 developer has to open up another menu, has to go find this
18 database called AdventureWorksLT2012_Data.mdf.

19 THE COURT: It says, "Visual Studio automatically
20 generates various files for the website, which collectively are
21 called a 'solution,' including the 'Global.asax' file discussed
22 later."

23 So we have a screen.

24 MR. WOLFF: Right. Are you looking at paragraph 40?

25 THE COURT: I am looking at 39.

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1 MR. WOLFF: So paragraph 39 is referring to the figure
2 that's under it.

3 THE COURT: And Global.asax appears on the screen as a
4 subset to default.

5 MR. WOLFF: Correct. And this would be some of the
6 project files the programmer is going to have to go back and
7 modify in subsequent steps.

8 THE COURT: That is another example of why human
9 beings are involved and it's not automatic.

10 MR. WOLFF: Exactly.

11 THE COURT: Let me stop you there. I will get back to
12 you. I want to get Mr. Abramson's take on this so far.

13 MR. ABRAMSON: Thank you, your Honor.

14 I would say that, as far as this is concerned, the
15 issue is what has to be automatic? And if you look at the
16 brief, the focus of the brief on summary judgment --

17 THE COURT: Let's look at this.

18 MR. ABRAMSON: The focus of the brief was on the
19 scanning step that Mr. Wolff was talking about. The scanning
20 step has to be automatic, the step of scanning the database.
21 And all we have seen here is the step of telling it what
22 database to scan.

23 THE COURT: So you have to have a human being instruct
24 as to the particular database that you're interested in. Once
25 he does that, makes that double click, he is finished.

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1 MR. ABRAMSON: When you are done on that, you will see
2 in the next paragraph it mentions a file Model.edmx. That is
3 the output. The scanning is done at that point. So you tell
4 it what database to scan, and you tell it to go, to scan, and
5 automatically --

6 THE COURT: Let me get back to Mr. Wolff.

7 Your response.

8 MR. WOLFF: My response would be to point to paragraph
9 41, 42, 43, 44 --

10 THE COURT: Take it slow.

11 MR. WOLFF: -- and 45.

12 Mr. Abramson kind of skipped over some of these steps.
13 You don't just point to the database. You have to add the
14 database, in paragraph 41, which shows up on the screen. The
15 screen has now changed for the user. The developer is then
16 going --

17 THE COURT: The user has clicked on that certain file.

18 MR. WOLFF: Correct.

19 THE COURT: And out comes of the database that is
20 depicted at paragraph 41. Then the user picks out what he
21 wants.

22 MR. WOLFF: The next thing the user has to do is tell
23 the software Visual Studio that he needs to open a new type of
24 a program, called an Object Relational Mapper.

25 THE COURT: So Mr. Abramson would say that each

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1 particular step is automatic, but the choice of which
2 particular files you want is a human's choice.

3 MR. ABRAMSON: I would actually say that the scanning
4 step is automatic, and I would look at these figures. The
5 Object Relational Mapper comes up in this process. As soon as
6 you tell it what database to pick, the Object Relational Mapper
7 is the default. You just click OK.

8 THE COURT: Let's go back to the claim and show me
9 what in the claim reaches this particular point.

10 MR. ABRAMSON: In the claims --

11 THE COURT: Claim 1.

12 MR. ABRAMSON: In Claim 1 --

13 THE COURT: Line.

14 MR. ABRAMSON: Bear with me on the line. I don't have
15 the line numbers in this copy.

16 MR. WOLFF: Mr. Abramson, would you like a copy of the
17 claim?

18 MR. ABRAMSON: I have the claims.

19 If you look at line 20.

20 THE COURT: "Causing said server to scan said database
21 and apply a body of rules to determine the table structures,
22 constraints and relationships of said data model, and store
23 representations thereof in machine-readable media accessible to
24 said server."

25 So causing is the result of human intervention, is it

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1 not?

2 MR. ABRAMSON: The actual act of causing the server to
3 scan the database presumes that we have already identified the
4 database. So the human effort is telling it to go.

5 THE COURT: That's what causing means.

6 MR. ABRAMSON: That's it.

7 THE COURT: What is your take on that, Mr. Wolff?

8 MR. WOLFF: Referring back to the claim, and
9 particularly the preamble, line 2, for automatically generate,
10 a processor -- I'm sorry, line 1.

11 THE COURT: "A method for operating a server
12 comprising a processor for automatically generating an end-user
13 interface."

14 MR. WOLFF: Correct. We can stop right there for a
15 second. And the reason that clause is important is because the
16 "automatically generating" language applies and brings life and
17 meaning into each limitation, steps A, B and C. And as a
18 consequence, it is the processor, not the user, that needs to
19 be performing each of the steps A, B and C.

20 THE COURT: The processor may use the step, but the
21 human being is saying which step to deal with.

22 MR. WOLFF: The human being is saying which step to
23 deal with, but the process is more involved than just
24 identifying a database.

25 As it shows in document 113-3, paragraph 42, you have

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1 to go in to this software tool Visual Studio. You need to open
2 this Object Relational Mapper, which is called LINQ to SQL or
3 an ADO.NET Entity Framework. You can see the selections in the
4 figure there. There's four different options that the user can
5 select for its preferences.

6 The next step in paragraph 43 shows that the user
7 needs to then select the database and click continue.

8 The following paragraphs --

9 THE COURT: So each particular step automatically
10 generates an end-user interface.

11 MR. WOLFF: No. We are not even to limitation C.

12 THE COURT: I am reading from the first sentence, line
13 1. "A method for operating a server comprising a processor for
14 automatically generating an end-user interface." That's where
15 the word automatic appears.

16 MR. WOLFF: Yes, your Honor.

17 MR. ABRAMSON: Your Honor, if I may.

18 THE COURT: Yes.

19 MR. ABRAMSON: If you look at the end of the preamble,
20 it says "said method comprising," and it has A, B and C.

21 What has to be automatic, your Honor is A, B and C.
22 The preamble of the claim presumes you're going to go through
23 the operation. The whole purpose of this invention is to be
24 able to take any arbitrary database, just pick any database,
25 and automatically create a user interface for it.

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1 THE COURT: I understand that.

2 MR. ABRAMSON: You have to tell it what database to
3 use. And we are talking now about the step B.

4 THE COURT: I have got it, Mr. Abramson.

5 MR. ABRAMSON: So step B --

6 THE COURT: Let Mr. Wolff finish.

7 MR. WOLFF: So the point is that the user has to go
8 through and specify all these preferences, by clicking on
9 menus, clicking on pull-down menus, specifying parameters, in
10 order to have the scanning function occur. So by definition it
11 is not automatic; it's requiring separate developer input.

12 THE COURT: Automatic, does that appear anyplace other
13 than line 2?

14 MR. WOLFF: It does refer to other spots in the claim
15 where it refers to automatic.

16 THE COURT: Line 2 is automatically generating. Once
17 there is a choice and a selection, then there is an automatic
18 generation of its end use.

19 MR. WOLFF: We haven't even generated the user
20 interfaces yet. We are still at the process of just telling
21 what preferences the developer has for how to set up and
22 generate -- to scan the database to generate a data model.

23 MR. ABRAMSON: Your Honor, that's not correct. The
24 set up that's involved here is identifying the database. The
25 Object Relational Mapper, if you look at paragraph 42, the

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1 black thing that's highlighted, that's the default that's given
2 to you automatically by that screen. You don't have to go find
3 it, select it, tell it what it is. It's there.

4 THE COURT: Let me stop you both. If we were to have
5 a trial on this issue, would you, Mr. Wolff, be trying this on
6 the basis of an actual use of your procedures or would you be
7 trying it through the words of the plaintiff's expert?

8 MR. WOLFF: Both.

9 THE COURT: Would you not be better off in allowing
10 the proof to come in before I can deal with this issue, where
11 you're both arguing in different ways and there is no real
12 rationale for me to say who is right and who is wrong?

13 MR. WOLFF: Your Honor, the issue is that the parties
14 have a fundamental disagreement as to the meaning of the
15 automatic and how that applies to the scanning and each of
16 these limitations here.

17 THE COURT: It's not that you're disagreeing on the
18 word automatic. You're disagreeing on when an automatic
19 operation comes into play and when it ends.

20 MR. WOLFF: And from start to finish, the only thing
21 that was supposed to happen in the patent is to identify a
22 database. No other steps, no other user interfaces were
23 supposed to be presented to the user except the final step, the
24 database access interfaces which are found at step C.

25 THE COURT: I am not able to give you summary judgment

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1 on this issue. It's not clear in my mind. I struggled with
2 this and with the language. In the *Markman* hearing, I
3 expressed reluctance to interpret matters in a way that would
4 aid one party and not the other. I was struggling to find a
5 neutral definition of terms, not to add terms, not to subtract
6 terms, but to give interpretive value to the entire expression,
7 in the context of the invention.

8 I can't tell you who is right, whether there is
9 contemplated a human selection that itself will then cause an
10 automatic generation of some other function or some other
11 result or whether everything has to be automatic.

12 MR. WOLFF: Can we resolve the claim construction
13 issue?

14 THE COURT: Which one?

15 MR. WOLFF: Automatic.

16 THE COURT: You agreed on a definition.

17 MR. ABRAMSON: I think we have resolved it.

18 THE COURT: No separate developer impact occurs.

19 MR. WOLFF: Input.

20 THE COURT: No separate developer input is required.

21 MR. WOLFF: All right. Let me address the second
22 issue since I know where your Honor is headed on that.

23 The second issue relates to limitation C in the
24 patent, limitation C in each of the claims. And if you will
25 refer to the claim, paragraph 377 of the patent, line 31.

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1 THE COURT: Yes, I have it in front of me.

2 MR. WOLFF: It says, "Integrates into each said mode
3 display processes for representing, navigating and managing
4 said relationships across tables."

5 There is another claim construction dispute here.

6 THE COURT: And I was asked at the *Markman* to define
7 "and" as "and/or," and I declined to do so.

8 MR. WOLFF: Correct.

9 THE COURT: And the parties have different arguments
10 here.

11 MR. WOLFF: Correct. Mr. Kaufman's position is that
12 it means and/or, meaning that each said mode does not need to
13 have all three display processes. And Microsoft's position is
14 that each process must have each process: Representing,
15 navigating, and managing. And this is just a basic grammar
16 issue. There is no factual dispute on this issue.

17 THE COURT: Mr. Abramson.

18 MR. ABRAMSON: Yes, your Honor. I don't know that
19 it's a dispute over exactly what the word "and" means. It's a
20 dispute over what the word "and" implies for the construction.

21 Microsoft is arguing here that the word "and" means
22 that, not only must each mode display integrate some processes,
23 but that it also has to integrate each and every one of the
24 listed processes. Our position on this is the word "and"
25 serves to define the set of processes that have be integrated

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1 in the displays. It doesn't go so far as to say that each and
2 every process must be integrated into each display.

3 THE COURT: Integrates into each said mode. And we
4 define mode as creation, retrieval, anything deleting.

5 MR. ABRAMSON: Actually, it's integrates into each
6 said mode display. The subject of that is mode display. Then
7 what gets integrated is processes. I don't know if that's a
8 huge distinction, but I think that's the proper parsing.

9 Integrates into each said mode display processes for
10 A, B and C. That means to us -- this is the key thing. You
11 have to interpret that in light of the specification. You
12 can't just blindly apply rigid rules of grammar to this. The
13 case law is very clear on this, the case law that we cited,
14 including a decision by Judge Rakoff in 2019. It's very clear
15 that this is the type of interpretation where you can't just go
16 by the niceties of grammar, you have to look at the
17 specifications.

18 THE COURT: We can start with the niceties of grammar.

19 What are the niceties of grammar here, Mr. Wolff? The
20 phrase "integrates into each said mode display processes for
21 representing, navigating and managing said relationships across
22 tables." One illustration you gave is that in the delete mode,
23 when something is eliminated, it's no longer represented, and
24 you don't need to navigate it because it's not there anymore.
25 And those two functions are absent from the delete mode. They

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1 may be present in another mode.

2 Mr. Abramson argues that the integration into each
3 mode does not necessarily mean that each of the processes has
4 to be reflected in that particular mode. So as long as you
5 cross the spectrum of the invention, have display processes for
6 representing, navigating, and managing, then you satisfy the
7 claim.

8 I don't know how artful that was, Mr. Abramson.

9 MR. ABRAMSON: I think that's accurate, and we would
10 refer to -- reading this in light of the specification, where
11 the specification says in the patent, on column 11, lines 45
12 through 49, UI is rendered for any given database table where
13 underlying object representation is referenced. That's the
14 result of the scanning we just talked about. And appropriate
15 components for depicting and traversing all cross-table LINQs
16 are automatically included in the resulting display.

17 So read in light of the specification, that's what it
18 means. And if you interpret it the way Microsoft wants to
19 interpret it, then the claim does not apply to any embodiment
20 in the specification. It's a red flag. There is no embodiment
21 in the specification that integrates into each mode display
22 each of those processes.

23 THE COURT: Mr. Wolff, I can't define this further.
24 We have the terms as they are, and they are not susceptible to
25 further definition.

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1 MR. WOLFF: Microsoft's position has been from the
2 start that this is clear, the claim language. This patent was
3 filed in 2001. It was prosecuted for years. An amendment was
4 filed six years later in 2007, prosecuted for another four
5 years. Mr. Kaufman sued Microsoft five years later. The
6 language of the claim is clear and unambiguous. Read it says
7 each mode display has processes for representing, navigating,
8 and managing. It has all three.

9 THE COURT: I can't define on summary judgment whether
10 your reading of this phrase or Mr. Abramson's reading of this
11 phrase, as applied to the alleged infringing device or method,
12 is the right one.

13 MR. WOLFF: Your Honor, can you resolve the claim
14 construction issue that you raised earlier, and that was
15 confirm that "and" does not mean "and/or."

16 THE COURT: I am not confirming anything. We have the
17 phrase as it is. It is a mistake to try to single out a single
18 word and give it meaning. It's used as it is. I am not able
19 to make further definition in it, and we will have to deal with
20 the entire phrase and see how it fits the evidence.

21 The motion for summary judgment is denied, at least
22 the specs that Mr. Wolff is arguing.

23 What is the next point?

24 MR. WOLFF: Thank you, your Honor.

25 MS. EDELMAN: Good morning, your Honor. Leah Edelman

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1 for Microsoft. I will be addressing the partial summary
2 judgment on the Schemalive issue.

3 This issue is about Mr. Kaufman's local patent rule
4 disclosure where he claimed that Schemalive, as disclosed in
5 the '981 patent, practices the '981 patent.

6 THE COURT: One minute.

7 You need something, Mr. Abramson? Take a minute. Are
8 you OK?

9 MR. ABRAMSON: I lost my pen.

10 THE COURT: OK. You found it.

11 MR. ABRAMSON: I did.

12 THE COURT: Go ahead, Ms. Edelman.

13 MS. EDELMAN: The fact is that Schemalive, as
14 disclosed in the '981 patent, does not practice the '981 patent
15 claim.

16 THE COURT: Schemalive is the plaintiff's methodology?

17 MS. EDELMAN: The Schemalive product is separate from,
18 to be distinguished from the Schemalive reference
19 implementation which is disclosed verbatim in the '981 patent
20 specification.

21 THE COURT: What are you telling me, that the machine
22 and the process used by the plaintiff is not an embodiment of
23 the patent?

24 MS. EDELMAN: All we are saying is that Mr. Kaufman
25 made a claim under the local patent rules that applied in this

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1 case, and he said that Schemalive practices the '981 patent.

2 THE COURT: Did I ever order those to be applicable?

3 MS. EDELMAN: No, your Honor. They were under the
4 original scheduling order that was ordered by Judge Swain at
5 the infancy of this case.

6 THE COURT: I didn't follow those rules.

7 MS. EDELMAN: That's correct, your Honor. But the
8 parties agreed to them under that original scheduling order,
9 and you can see in the pleadings that those infringement --

10 THE COURT: What do I care what the plaintiffs
11 actually do?

12 MS. EDELMAN: It's a disclosure issue, your Honor.

13 THE COURT: It leads to what? It's not relevant.

14 MS. EDELMAN: It is relevant, your Honor.

15 THE COURT: How? I am measuring infringement by what
16 the defendant does, not by what the plaintiff does.

17 MS. EDELMAN: The disclosure, your Honor, is relevant
18 to these issues because, as your Honor correctly points out,
19 infringement is only between the patent claims and the accused
20 product.

21 THE COURT: Right. What do I care how the embodiment
22 in plaintiff's practices work? I don't care.

23 MS. EDELMAN: You're right, your Honor. The jury
24 shouldn't care either, but the jury might get confused.

25 THE COURT: It won't get confused. There won't be any

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1 evidence of it.

2 MS. EDELMAN: Regarding Schemalive?

3 THE COURT: That's the plaintiff's work?

4 MS. EDELMAN: Yes.

5 THE COURT: You need it? You want it, Mr. Abramson?

6 MR. ABRAMSON: Absolutely, your Honor.

7 THE COURT: Why?

8 MR. ABRAMSON: This is a demonstrative of how this
9 invention works. Absolutely we want to be able to demonstrate
10 reference limitation in the specification of the patent.

11 THE COURT: I don't think it's relevant.

12 MR. ABRAMSON: Well, it's relevant to explain the
13 technology, to explain the background and what Mr. Kaufman
14 invented, because they are attacking this as being anticipated
15 by prior art.

16 THE COURT: We measure the claims against the prior
17 art.

18 MR. ABRAMSON: We measure the claims against the prior
19 art, but it is a demonstrative, it's an aid to the jury. How
20 does this technology work? I think it's very relevant to take
21 the actual working example in the patent.

22 THE COURT: You have an enablement in the patent
23 itself.

24 MR. ABRAMSON: We have an enablement.

25 THE COURT: And that's how it works. And we don't

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1 take into consideration how you actually use devices or
2 processes. It's not relevant.

3 MR. ABRAMSON: The entire disclosure, all the figures
4 in the patent, is based upon the operation of this software
5 machine, this machine.

6 THE COURT: That's not part of the patent application.

7 MR. ABRAMSON: It is the entire specification.

8 THE COURT: Then we will deal with the specification.

9 MR. ABRAMSON: We have taken literally what is in the
10 specification. It's a couple of hundred pages of code, that's
11 why it's so thick. We just ran the code on the machine.
12 That's a demonstration which I think is the most helpful thing
13 that the jury could see to understand what that invention is.
14 Let's see it run. Let's see it work.

15 THE COURT: That's not relevant.

16 MR. ABRAMSON: If I can't show that to the jury, then
17 it's going to become very difficult, abstract. I will be
18 limited to demonstrating their product, which we can certainly
19 do.

20 THE COURT: That's what you have to do. That's the
21 infringement issue.

22 MR. ABRAMSON: I want Mr. Kaufman to be able to do
23 that. If he can't show his own product --

24 THE COURT: Let me have a moment.

25 (Pause)

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1 THE COURT: Let me ask you what you want to prove.
2 You want to prove that Schemalive -- is that how it's
3 pronounced? You want to prove that that in which plaintiff
4 does is the embodiment of the patent.

5 MR. ABRAMSON: I don't want to prove that, your Honor.

6 THE COURT: What do you want to prove?

7 MR. ABRAMSON: I want to prove that Microsoft's
8 product infringes the patent, and I want to use the example in
9 the patent specification itself to explain to the jury how the
10 invention works.

11 THE COURT: If you are going to compare what Microsoft
12 does with what the plaintiff does, you have to have an ability
13 to prove that what the plaintiff does is what the patent
14 teaches. Otherwise you don't have the things equal to the same
15 thing or equal to each other.

16 MR. ABRAMSON: I agree with that, your Honor.

17 THE COURT: I am not going to run that trial. I am
18 not going to run a trial as to whether or not that which
19 Kaufman does is that which Kaufman taught.

20 MR. ABRAMSON: So your concern is the prejudicial
21 effect.

22 THE COURT: I am concerned about two things. I am
23 concerned about the large expansion of trial time on an issue
24 that is not directly relevant, nor will it help the jury and it
25 will confuse the jury, so the element of prejudice comes in as

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1 well. Because we are not focusing on what Kaufman does.

2 MR. ABRAMSON: Understood, your Honor.

3 Can I confer with my client for one minute?

4 THE COURT: Yes.

5 Let's take ten minutes.

6 (Recess)

7 THE COURT: Yes, Mr. Abramson.

8 MR. ABRAMSON: Yes, your Honor.

9 So our intent with that demonstration would be to
10 animate -- since the jury is not going to understand computer
11 code, which is a couple of hundred pages of the patent --

12 THE COURT: We are dealing with claims, not computer
13 code.

14 MR. ABRAMSON: I understand. If your Honor believes
15 that would be inappropriate, then that's your Honor's ruling.

16 THE COURT: I am interested in what you are going to
17 use it for.

18 I have this little book called Anatomy of a Patent
19 Case, prepared by the Complex Litigation Committee of the
20 American College of Trial Lawyers, published by the Federal
21 Judicial Center 2009. On page 103, there is the following
22 discussion:

23 "Under some circumstances, courts have granted motions
24 to preclude evidence of the patentee's embodiment of the
25 invention. Comparing the accused products to the patentee's

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1 embodiment of the invention is contrary to long-standing
2 principles of patent law. Specifications teach. Claims claim.
3 Infringement, literal or by equivalence, is determined by
4 comparing an accused product not with a preferred embodiment
5 described in the specification, or with a commercialized
6 embodiment of the patentee, but with properly and previously
7 construed claims in suit."

8 MR. ABRAMSON: I would say that's an accurate
9 statement. Our purpose of doing this would not be to prove our
10 case by comparing Dynamic Data against this demonstration, but
11 rather, it's a demonstrative to show how the technology works.

12 THE COURT: I think that's got to be done a different
13 way, and I am not going to allow embodiment by your
14 commercialized product.

15 MR. ABRAMSON: Understood, your Honor.

16 THE COURT: That moots what you have to say, right,
17 Ms. Edelman?

18 MS. EDELMAN: Yes, your Honor.

19 I would mention, your Honor, I believe it also would
20 moot our discussion regarding Microsoft's MIL number 1. This
21 discussion that we are having now would moot our discussion
22 regarding the first motion in limine, Microsoft's first motion
23 in limine.

24 THE COURT: OK. Willfulness. Who is going to argue
25 willfulness?

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MR. DAVIS: It will be Ms. Hardin-Smith.

MR. ABRAMSON: And Mr. Jaffess for us.

MS. HARDIN-SMITH: Good afternoon, your Honor.

THE COURT: Good afternoon, Ms. Hardin-Smith.

Have you signed in?

MS. HARDIN-SMITH: I believe so.

THE COURT: I know you from before.

MS. HARDIN-SMITH: I apologize, your Honor.

THE COURT: Go ahead.

MS. HARDIN-SMITH: So I am arguing Microsoft's motion for partial summary judgment of no willfulness. At the outset, we would like to point out that this is Mr. Kaufman's burden to prove willful infringement, and there is no record evidence at all that Microsoft even had knowledge of Mr. Kaufman's '981 patent, let alone willfully infringed it before the filing of this lawsuit.

One thing we want to point out is it's an essential element of willful infringement that the alleged infringer have knowledge of the patent-in-suit. There is absolutely no evidence of that here, and, notably, Mr. Kaufman's brief, in response to this summary judgment motion, is silent on this point. There is no case law, they have cited no case law to dispute the fact that knowledge of the patent-in-suit is an essential element of willful infringement.

As your Honor, I believe, started to mention, Mr.

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1 Kaufman has pointed to a number of citations to Mr. Kaufman's
2 patent publications and tries to link that to knowledge of the
3 patent-in-suit. However, there is a sharp distinction between
4 a patent application, and a publication of a patent
5 application, and the actual patent-in-suit. All of the
6 citations that Mr. Kaufman has pointed to in Microsoft's patent
7 applications all are to patent publications of the '981 patent
8 application, or in the '981 patent family, but none of them are
9 to the patent-in-suit. And knowledge is an essential element
10 of willful infringement. If there is absence of knowledge on
11 the record, that is warranted to grant summary judgment of no
12 willfulness.

13 MR. JAFFESS: Good afternoon, your Honor. Ari Jaffess
14 on behalf of the plaintiff.

15 As a matter of law, it would be improper to find a
16 lack of knowledge. There is sufficient evidence for a jury
17 here to find knowledge of Mr. Kaufman's --

18 THE COURT: Where is the knowledge?

19 MR. JAFFESS: If you could look at our opposition
20 brief.

21 THE COURT: One minute.

22 What is the ECF number?

23 MR. JAFFESS: 126, ECF page 25.

24 THE COURT: What page?

25 MR. JAFFESS: ECF 25. At the bottom it's page 21 of

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1 our brief. This is the timeline.

2 THE COURT: Page 21 of your brief?

3 MR. JAFFESS: Yes. ECF page 25 out of 30.

4 This is the timeline with the citations, your Honor.

5 THE COURT: What is the paragraph number?

6 MR. JAFFESS: There is no paragraph numbering.

7 THE COURT: What is the pagination?

8 MR. JAFFESS: The pagination is at the bottom right,
9 which is our pagination.

10 THE COURT: Yes.

11 MR. JAFFESS: 21.

12 THE COURT: We are on 21.

13 MR. JAFFESS: At the top of the page, just the
14 timeline, it shows all of the citations. These are actually
15 the key citations. There is more than this.

16 THE COURT: Just tell me here, what shows that
17 Microsoft knew about your patent?

18 MR. JAFFESS: So this shows that Microsoft patent
19 applications had Mr. Kaufman's patent publications cited
20 against them. And not just in an offhand manner. They were
21 directly cited and compared with, and the Microsoft
22 applications were rejected over Mr. Kaufman's disclosures.

23 THE COURT: The top of the blue line or below it?

24 MR. JAFFESS: The ones below, the citations are below.

25 THE COURT: So applications by Microsoft are

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1 mentioned. The patent issued when?

2 MR. JAFFESS: In 2011, February 8.

3 THE COURT: So before that the application was not
4 published.

5 MR. JAFFESS: The application was published, the
6 claims were not issued. But the claims were pending in the
7 family, the claims --

8 THE COURT: Does Microsoft have an obligation to
9 refrain from practicing that which is in the application if it
10 believes that the application is not valid?

11 MR. JAFFESS: Once it's issued, they absolutely do.

12 THE COURT: So it's when it's issued?

13 MR. JAFFESS: Yes.

14 THE COURT: We are looking only then at items 3 in
15 green.

16 MR. JAFFESS: Well, the knowledge doesn't go away once
17 it issues. They have knowledge of the family, of its pendency,
18 their sophisticated actor. These aren't random, offhand
19 citations.

20 THE COURT: Let me ask you again. Supposing you know
21 that there is an application for a patent pending and you in
22 good faith believe that that application is not valid, are you
23 obligated to refrain from practicing what ultimately becomes an
24 infringement?

25 MR. JAFFESS: Before it becomes an infringement,

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1 before it issues?

2 THE COURT: Before it issues.

3 MR. JAFFESS: We have no evidence of their good-faith
4 belief or any belief because they have shielded it with
5 privilege, as is their right. But there is an absence of that
6 information. What we know is that Microsoft was aware of this
7 patent family --

8 THE COURT: What do you mean a patent family?

9 MR. JAFFESS: So there are multiple patents that get
10 applied for with the same disclosure. Their claims can differ.

11 THE COURT: So that just shows confusion; it doesn't
12 show knowledge.

13 MR. JAFFESS: It does not directly show knowledge, but
14 it circumstantially shows knowledge. And some of the people
15 involved --

16 THE COURT: You want me to rule -- you don't want me
17 to rule.

18 MR. JAFFESS: No, I don't. As a matter of law, you
19 can't rule that there is no knowledge.

20 THE COURT: So let me ask Ms. Hardin-Smith. What is
21 the legal effect of matters related to the patent in question
22 when the patent issues?

23 MS. HARDIN-SMITH: As to willful infringement, your
24 Honor, none. The essential element is it has to be knowledge
25 of the patent-in-suit. It cannot be knowledge of the patent

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1 family, it cannot be knowledge of the patent publications
2 related to the patent-in-suit.

3 THE COURT: Well, the patent comes out February 8,
4 2011, and Microsoft continues to infringe, for the sake of our
5 discussion here. If there is no infringement, there is no
6 willfulness. So we are only dealing with this subject on the
7 assumption that what you did was infringing and on the
8 assumption that the patent is valid. So given those
9 assumptions, if you knew the patent -- and you are charged with
10 knowledge on February 8, 2011, are you not?

11 MS. HARDIN-SMITH: Absolutely. As of February 8,
12 2011, we are charged with knowledge of the patent-in-suit.

13 What you will notice in the timeline that Mr. Jaffess
14 has referred you to, the numbers 3 and 4, the patent
15 application citations, those are not to the patent-in-suit;
16 those are to patent applications, published applications
17 related to the '981 patent application.

18 THE COURT: Where do you see 3 and 4?

19 MS. HARDIN-SMITH: It's on the same page that Mr.
20 Jaffess referred you to on page 21.

21 THE COURT: I am looking at the timeline on top of the
22 page.

23 MS. HARDIN-SMITH: I'm sorry?

24 THE COURT: I am looking at the timeline at the top of
25 the page.

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1 MS. HARDIN-SMITH: That's correct. If you see numbers
2 3 and 4 -- I'm sorry, number 3 in green on the bottom of the
3 timeline.

4 THE COURT: There are two green numbers 3.

5 MS. HARDIN-SMITH: That's correct. And although those
6 fall after the patent issued, those particular citations do not
7 cite to the patent-in-suit, your Honor; they cite to patent
8 application publications related to the '981.

9 THE COURT: Wouldn't you say this is an issue of fact?

10 MS. HARDIN-SMITH: No, your Honor.

11 THE COURT: Maybe I should add this. If there is an
12 issue of willfulness, it will not be put to the jury and not be
13 tried until after a finding of infringement. Wouldn't it be
14 better for me, and for you, for me to deny your motion at this
15 point in time and if it comes up, it comes up after a finding
16 of infringement?

17 MS. HARDIN-SMITH: No, it would not be better, in our
18 opinion, because it will add extra time that is unnecessary to
19 the case. Because at the outset, there is no factual dispute
20 here. Although Mr. Kaufman is pointing to a patent
21 publication --

22 THE COURT: I think Mr. Davis is anxious to have a
23 word with you.

24 MR. DAVIS: Actually, your Honor, respectfully, I
25 wanted to have a word with your Honor. I just want to make

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1 sure, if your Honor is --

2 THE COURT: No. We have got Ms. Hardin-Smith and she
3 is quite capable.

4 MR. DAVIS: Absolutely.

5 MS. HARDIN-SMITH: So just a quick follow-up to what
6 you're stating regarding willful infringement. Our question is
7 if you would like to bifurcate the case, so that in that sense
8 there would be no evidence of willful infringement in the
9 initial phrase.

10 THE COURT: Absolutely not.

11 MS. HARDIN-SMITH: OK.

12 So where we left off, there is no issue, there is no
13 genuine issue of fact here.

14 THE COURT: I should tell you this because we will get
15 to it later. My thought is to have three phases to this trial.
16 Number one is validity and infringement, or infringement and
17 validity. I am not sure what the sequence will be. Number two
18 is damages. Number three is willfulness. So there will be no
19 proof of damages in the first section. There will be no proof
20 of willfulness in sections one and two.

21 MS. HARDIN-SMITH: Understood, your Honor.

22 So we still believe that willfulness can be resolved
23 now because there is no triable issue of fact.

24 THE COURT: It's a little confusing to me here. If
25 the references in December of 2006 and December of 2009 to

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1 Kaufman advised Microsoft of the nature of the patent that is
2 ultimately issued on February 8, 2011, I get confused because
3 that seems to suggest that the patent doesn't do anything
4 except enlarge the time span of the earlier patent, which would
5 be a patent abuse.

6 MS. HARDIN-SMITH: Your Honor, there is one patent
7 here that is issued, and that was on February 8, 2011.

8 THE COURT: The '981 patent.

9 MS. HARDIN-SMITH: Correct.

10 THE COURT: I will ask this to Mr. Jaffess. If the
11 references in December 2006 and 2009 sufficiently advised
12 Microsoft of your patent, how can the patent office issue still
13 another patent, the '981 patent, in February 2011?

14 MR. JAFFESS: Those were pending patent applications
15 that had claims that were different but similar to those that
16 ultimately did issue. But those are publications, those are
17 not themselves patents.

18 THE COURT: How can that advise anybody of anything?

19 MR. JAFFESS: The people involved in those patent
20 applications, at least one of them, were actually involved in
21 the Dynamic Data product, the Microsoft folks.

22 The Microsoft application that was rejected was
23 actually called "Automatically Generating Web Forms from
24 Database Schema."

25 THE COURT: They were rejected.

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1 MR. JAFFESS: Yes. Microsoft had an application with
2 that title that was rejected over Mr. Kaufman's pending patent
3 application, and some of the people that were involved were
4 also involved in Dynamic Data.

5 THE COURT: I don't see where there is proof that
6 Microsoft knew of your patent.

7 MR. JAFFESS: Proof is not required, direct proof. It
8 is sufficient proof for a jury to reasonably find that they
9 were on notice, and the sum total of all of this evidence, your
10 Honor, is sufficient.

11 MS. HARDIN-SMITH: Your Honor, if I may add a few
12 points. One, Mr. Kaufman was aware as early as 2011 of the
13 potential that Mr. Microsoft might have infringed his patent
14 and never notified Microsoft.

15 THE COURT: I am aware of it.

16 MS. HARDIN-SMITH: This is in Mr. Kaufman's deposition
17 testimony.

18 THE COURT: I am aware of that.

19 MS. HARDIN-SMITH: So he at no point chose to notify
20 Microsoft.

21 THE COURT: Another way of setting up a willfulness is
22 by giving specific notice, Hey, you're infringing my patent,
23 cease and desist.

24 MR. JAFFESS: Your Honor, there was notice provided at
25 the filing of suit, and there is also the concept of post-suit

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1 willfulness. In light of the clear allegations in this
2 litigation, Microsoft continued to leave Dynamic Data on offer
3 to the public.

4 THE COURT: Supposing there is an good-faith belief
5 that your patent stinks?

6 MR. JAFFESS: We have no knowledge of that because --

7 THE COURT: They have responded to your lawsuit by
8 answering it and alleging defenses.

9 MR. JAFFESS: That's an issue of fact, your Honor, the
10 reasonableness of that belief and what belief that was.

11 THE COURT: What you want to do is punish Microsoft
12 for defending against your lawsuit.

13 MR. JAFFESS: It's for continuing to leave it on offer
14 after the lawsuit was filed when infringement and validity were
15 clear. And there is case law that we cited regarding the
16 reasonableness of such defenses and that they are not a defense
17 to willfulness, your Honor.

18 MS. HARDIN-SMITH: Your Honor, if I may also add, Mr.
19 Kaufman's allegations of post-suit willful infringement should
20 be waived as untimely. At no point did Mr. Kaufman notify
21 Microsoft of its allegation of post-suit willful infringement
22 until --

23 THE COURT: His lawsuit. He had his notification
24 there.

25 In your brief -- do you know the ECF number?

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1 MS. HARDIN-SMITH: What are you referencing, your
2 Honor.

3 THE COURT: I am asking Mr. Jaffess. He says there
4 are cases that say that post-filing infringement would be the
5 basis for willfulness.

6 MR. JAFFESS: Yes, your Honor. 22 to 23 of our brief.

7 THE COURT: 143, right? Your brief is 143?

8 MR. JAFFESS: 126, your Honor.

9 THE COURT: I decline to follow the two cases you
10 cite, one in the District Court of Delaware and the other in
11 the Eastern District of Texas. It seems to me that if you have
12 a good-faith belief in your defenses, that you should be able
13 to litigate the lawsuit. Willfulness in that context is a
14 stratagem to double the scope of your damage and obtain other
15 kinds of relief that are normally unavailable to a patent case.
16 So I grant the motion with regard to striking willfulness.

17 MS. HARDIN-SMITH: Thank you, your Honor.

18 MR. JAFFESS: Your Honor, for clarity, you were
19 talking about post. You are granting the motion as to pre as
20 well?

21 THE COURT: You have not given notice. There is
22 nothing in the record to show that they had knowledge of your
23 patent and knowledge of their infringement, and you have to
24 show actual knowledge.

25 MR. JAFFESS: Your Honor, if I might, on the timeline

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1 once more.

2 THE COURT: Yes.

3 MR. JAFFESS: There's citations in late 2011 and 2014.

4 THE COURT: Let me pick it up again.

5 MR. JAFFESS: Just two points. These citations were
6 after the patent issued.

7 MS. HARDIN-SMITH: I might add they are two patent
8 publications. Those are the citations. They are not citations
9 to the patent-in-suit.

10 MR. JAFFESS: I would also add --

11 THE COURT: These are items 3 you're talking about,
12 right?

13 MR. JAFFESS: It's at the bottom towards the right, in
14 late 2011, November 29, 2011, and October 8, 2014.

15 THE COURT: There is a green number 3.

16 So what is cited against Microsoft?

17 MR. JAFFESS: I believe it was the publication of the
18 ultimately issued patent which had already issued.

19 THE COURT: You believe or was it?

20 MR. JAFFESS: I would have to double-check, your
21 Honor.

22 THE COURT: If it's not a citation to the patent
23 itself, then it doesn't show actual knowledge.

24 MR. JAFFESS: Because of privilege there wouldn't be
25 actual knowledge here, your Honor. They have provided a

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1 privilege log, which we have provided to your Honor, where
2 these citations were discussed.

3 THE COURT: That means they can't use it, but you
4 can't use it either.

5 Answer my question. If the patent were a bar to their
6 application, it would have been cited. But the citation was
7 not to their patent, it was to an application.

8 MR. JAFFESS: Your Honor, if I might. It's the same
9 patent and patent examiners don't always cite the most recent
10 item in a patent family. To them, it's not a concern about the
11 patents, it's a concern about the disclosure. But when someone
12 looks at it on the flip side, when it's been cited to them,
13 it's very clear it has been issued.

14 THE COURT: You have to show me the language of that
15 citation that would cause me to believe that there is a proof
16 of actual knowledge.

17 MR. JAFFESS: If I could have a few minutes.

18 THE COURT: You can have it.

19 (Pause)

20 THE COURT: It's obviously not in the record of this
21 motion, right?

22 MR. JAFFESS: The fact that it was cited is in the
23 record, your Honor.

24 THE COURT: The fact of the citation is in the record,
25 but the citation itself and the knowledge that would arise from

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1 it is not.

2 MR. JAFFESS: Understood, your Honor.

3 THE COURT: The motion of defendant's to strike the
4 claim of willfulness, to dismiss it, is granted.

5 We need to now go into the next phase.

6 Let's do the motions in limine I guess.

7 MR. ABRAMSON: Yes, your Honor. That's correct.

8 THE COURT: Kaufman motion number 1 moves to exclude
9 reference to or arguments advanced in the inter partes review
10 proceedings in the patent office.

11 Now, admission by the party is relevant. The fact of
12 the proceedings, or the location of the admission, is not
13 relevant.

14 Now, having had those rulings, what is left for me to
15 deal with, Mr. Abramson?

16 MR. ABRAMSON: Nothing, your Honor. I think that's
17 sufficient.

18 THE COURT: Mr. Davis.

19 MR. DAVIS: Ms. Edelman.

20 MS. EDELMAN: Your Honor, that would also resolve
21 Microsoft's motion in limine number 4.

22 THE COURT: So we have dealt with that.

23 Kaufman motion number 2 moves to exclude Microsoft's
24 expert from testifying about claim construction.

25 What is the relevance of that, Ms. Edelman?

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Who is doing this?

MR. ABRAMSON: Which motion in limine?

THE COURT: Kaufman motion number 2, moving to exclude Microsoft's expert to testify about claim construction.

MR. ABRAMSON: The issue here is that the expert submitted a report, gave deposition testimony.

THE COURT: I asked Mr. Jaffess to respond. What is the relevance?

MR. JAFFESS: Sorry.

THE COURT: I have got the wrong guy.

Mr. Wolff.

MR. WOLFF: Microsoft has no intention of having its expert testify about claim construction other than to just use the constructions that were provided by the Court. There are certain terms in the claims that have not been resolved by the Court. You addressed two of those.

THE COURT: There is not going to be an expert testifying about that, I don't think.

MR. WOLFF: It should apply to both sides. No expert should be testifying about claim construction. Mr. McGoveran in his report provides a foundational basis for his opinions, and that is what they are complaining about.

THE COURT: The proposition is neither side can have an expert testifying about claim construction.

MR. WOLFF: Correct.

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1 THE COURT: Are you satisfied with that, Mr. Abramson?

2 MR. ABRAMSON: Yes, I am, your Honor.

3 THE COURT: Then that's done.

4 Kaufman motion number 3, to cure prejudice from
5 Microsoft's alleged spoliation of usage data, Kaufman seeks to
6 preclude Microsoft from introducing certain evidence and
7 arguments regarding usage data.

8 I need some help on this motion. Remind me about the
9 spoliation.

10 MR. ABRAMSON: Mr. Patchen will address that, your
11 Honor.

12 THE COURT: Go ahead.

13 MR. PATCHEN: Good afternoon. Alex Patchen on behalf
14 of plaintiff.

15 So in this case we have asked Microsoft to produce
16 documents or to determine ultimately how many users of Dynamic
17 Data were there? We have gotten consistently differing stories
18 from Microsoft. First they provided data from 2017 forward,
19 says there wasn't any. Then during the deposition of their
20 30(b)(6) witness on this, it turns out that there was data that
21 went further back that they had not obtained. And that
22 information was actually removed after this litigation was
23 filed and a litigation hold should have been put in place.

24 THE COURT: Just a minute. In an answer to an
25 interrogatory, Microsoft answered it had no customers. But in

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1 a 30(b)(6) deposition, what did you learn?

2 MR. PATCHEN: In answer to its interrogatory, it said
3 it had some telemetry data.

4 THE COURT: What kind of data?

5 MR. PATCHEN: Telemetry, which is data that shows how
6 many people created a Dynamic Data project on a two-day basis.

7 THE COURT: What is telemetry?

8 MR. PATCHEN: It's recording. So the way this worked
9 is any time there was a user who opened or created a Dynamic
10 Data project in a one-month period twice --

11 THE COURT: So it has telemetry data of use.

12 MR. PATCHEN: Correct. They provided limited
13 telemetry data from middle of 2017 to 2018. When we had asked
14 for further data going back further in time, we were told that
15 they had deleted the data for a number of reasons, including
16 because of GDPR.

17 THE COURT: Because of what?

18 MR. PATCHEN: European privacy protection rules that
19 went into place, GDPR.

20 THE COURT: In other words, they were forced to delete
21 the information by operation of law.

22 MR. PATCHEN: They didn't go that far. They said they
23 wanted to be in compliance with the European privacy law. The
24 telemetry data they produced was US-related user, so it doesn't
25 necessarily require -- they might not have been in violation of

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1 the law otherwise.

2 THE COURT: They gave you information about US
3 telemetry users between 2017 and 2018 and not before.

4 MR. PATCHEN: That's correct.

5 THE COURT: And they gave you no information about
6 European use.

7 MR. PATCHEN: That's correct. We are not seeking
8 information as to European use because it's a US patent.

9 THE COURT: And the documents showing the possibility
10 of usage data before 2017 were deleted.

11 MR. PATCHEN: Correct. And that was the testimony
12 from their 30(b)(6) witness.

13 THE COURT: And the pretext was the European rule?

14 MR. PATCHEN: He said that amongst other reasons. He
15 didn't provide any further detail.

16 THE COURT: What remedy do you want?

17 MR. PATCHEN: We are seeking two remedies: One, that
18 they can't now come in and try to provide usage data from an
19 earlier period of time; and two --

20 THE COURT: Earlier period before 2017.

21 MR. PATCHEN: That's correct. And what we are talking
22 about is specifically telemetry information. If they want to
23 use qualitative information to try to say that the usage was
24 low, we are not objecting to that.

25 THE COURT: Did they give you that information? Is

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1 that spoiled?

2 MR. PATCHEN: They ultimately pick and chose and found
3 some limited information as to some usage from 2011 using a
4 different system which they themselves, their witness called
5 completely random. So that information should not be
6 presented.

7 The other relief we are seeking is because --

8 THE COURT: I am still not clear what the first is.
9 You want them not to be able to prove any usage data.

10 MR. PATCHEN: Not to be able to provide any form of
11 alternate usage data.

12 THE COURT: What is alternate usage data?

13 MR. PATCHEN: For example, the main telemetry
14 information was from the 2017 to '18 period. Microsoft did
15 make efforts, when we raised this issue, to find whatever they
16 could find. They were able to find some limited information
17 from a further back period of time from data called SQM data,
18 which is a different type of telemetry, through different
19 systems, which they themselves have said is unreliable.

20 THE COURT: What is it you want me to do, rule that
21 they cannot use any data to show use and nonuse before 2017?

22 MR. PATCHEN: That's the first part of the relief we
23 are seeking.

24 THE COURT: What is the second part?

25 MR. PATCHEN: The second is, in order for -- 2011 is

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1 when the patent issued. That's the key date from a reasonable
2 royalty perspective.

3 THE COURT: Can't you give me a succinct statement of
4 what remedy you want from me?

5 MR. PATCHEN: The second relief is for them not to be
6 to challenge the methodology that our damage expert used to
7 estimate what the usage was in 2011.

8 THE COURT: Why not?

9 MR. PATCHEN: Because they should have retained data
10 going further back in time. They told us from 2015 going
11 forward is when they had this newer system of data in place and
12 that they did not retain from 2015 through 2017. So that would
13 have provided a longer range of data, which would have allowed
14 a more thorough view of the trends and usage.

15 THE COURT: How much usage was there in 2017 to 2018?
16 It's two years, right?

17 MR. PATCHEN: The usage was approximately 770 users a
18 month. That's what our damage expert determined based on the
19 usage data, the two-day usage data that they provided.

20 THE COURT: 770 users per month.

21 MR. PATCHEN: Correct.

22 THE COURT: How much for the two-year period?

23 MR. PATCHEN: The royalty calculation that our damage
24 expert used was based on a monthly usage, with a monthly
25 royalty, for calculation purposes. So the 770 users per month

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1 times 12.

2 THE COURT: What did your expert do, extrapolate them
3 backwards and say it would be the same use between 2011 and
4 2017?

5 MR. PATCHEN: No. What he did was he extrapolated
6 backwards to show that there was a significantly higher use in
7 2011. And that was because, as even Microsoft has argued, the
8 product was no longer being actively promoted and it was on a
9 downward trend, so by the time you get to 2017 to '18 the use
10 was significantly less.

11 THE COURT: So 770 users per month was the end of a
12 downward trend.

13 MR. PATCHEN: Correct.

14 THE COURT: How do you know that?

15 MR. PATCHEN: We know that because what we did is we
16 used something called Google Trends, and Google Trends shows
17 the relative interest in time between 2011 and 2017.

18 THE COURT: Google Trend?

19 MR. PATCHEN: Google Trends, plural.

20 THE COURT: What kind of method is that?

21 MR. PATCHEN: It is a method that has been used in
22 academic literature, and our damage expert testified to it and
23 referenced it in his report, as to a way to show relative
24 interest. What Google Trends does, it says how many people
25 were searching for a term, in this instance Dynamic Data, in

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1 2011? How many people were searching for the same term from
2 2011 all the way through? And Microsoft actually uses Google
3 Trends for other purposes.

4 THE COURT: Let me get the position of Microsoft.

5 Mr. Davis.

6 MR. DAVIS: Thank you, your Honor. This is somewhat
7 of a difficult issue. I want to try to cut through and start
8 off with some points that I think really aren't in dispute. I
9 will go through in a little more detail what actually happened
10 with the documents, but the fundamental issue that really
11 suggests the motion should be denied is the following.

12 The way that Mr. Patchen just characterized the
13 searches that were done was a search for Dynamic Data. As you
14 heard a little bit earlier from my colleague, Mr. Wolff, what
15 is actually at issue --

16 THE COURT: Can I ask this question, Mr. Davis. Was
17 there spoliation?

18 MR. DAVIS: There's documents and information that was
19 lost. Our position is it's not relevant to the issues in this
20 case. And as soon as we were alerted to the fact that counsel
21 believed there was an issue, we took all the curative steps
22 that we could. We put up our 30(b)(6) for another deposition.
23 We paid for counsel to fly back out to Seattle or Bellevue and
24 take an additional deposition.

25 THE COURT: In the end was usage data provided?

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1 MR. DAVIS: There is certainly usage data that was
2 provided from 2017 and on forward.

3 THE COURT: The relevant period begins with the
4 patent, right?

5 MR. DAVIS: It does. And that is where I was going
6 initially. The patent issued in 2011 and the damages experts
7 agree that the relevant time frame for the hypothetical
8 negotiation would have been around that time. Because Mr.
9 Kaufman did not put Microsoft on notice of his patent, and
10 Microsoft first got its notice with the filing of this suit
11 in --

12 THE COURT: Maybe I am just misunderstanding this.
13 His damage will be based on a hypothetical royalty rate from
14 2011 forward, but that would be the rate. It would be
15 multiplied by the number of instances of infringement. That
16 would be your use. And so I ask you a simple question. At any
17 time did Microsoft produce to the plaintiff evidence of all
18 use? Did it give a full and complete answer to the
19 interrogatory how many times did you use the accused device?

20 MR. DAVIS: I understand your Honor's question, and I
21 am going to try my best to answer it.

22 THE COURT: Can you answer it directly, please?

23 MR. DAVIS: Yes. Microsoft gave the plaintiffs all of
24 the evidence that it had at the time that this issue arose.

25 THE COURT: Isn't it required that you give all

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1 instances of use?

2 MR. DAVIS: Can you repeat that?

3 THE COURT: Shouldn't you be giving all instances of
4 use?

5 MR. DAVIS: We certainly should be giving them all
6 instances of use. But the issue is, your Honor, how we define
7 use. The telemetry that counsel is referring to doesn't
8 actually identify use of the accused functionality, and that's
9 the point that I was attempting to make.

10 THE COURT: We will postpone this until 2:15. We will
11 continue.

12 (Luncheon recess)

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AFTERNOON SESSION

2:15 p.m.

THE COURT: Be seated, please. Continue, Mr. Davis.

MR. DAVIS: Thank you, your Honor. I think the place to start and to go back to was during the argument I heard Mr. Patchen ask for a few remedies. The first remedy he sought was that Microsoft would not use any of the earlier telemetry data in response in its case, and we can agree that we won't do that.

THE COURT: OK.

MR. DAVIS: The second remedy that he sought was that Microsoft not be allowed to effectively cross-examine their damages expert on the Google Trends analysis that he performed, and we believe that would be an inappropriate remedy.

THE COURT: Appropriate or inappropriate?

MR. DAVIS: Inappropriate. That we should be permitted to cross-examine their expert on the use of that Google Trends data.

THE COURT: How does he prove damages if there are no records and you should have produced the records?

MR. DAVIS: So, with your Honor's permission, I'd like just a few minutes to frame the issue, because I think if the Court will allow me to do so, I think we will answer that question.

THE COURT: I will ask Mr. Patchen to sit down.

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1 MR. DAVIS: Thank you. Microsoft over time, since the
2 relevant time that the patent issued, has had two telemetry
3 systems. The first one that was in effect at the time that the
4 patent issued has been referred to by the parties as SQM. That
5 was in effect when the patent issued. It was in effect when
6 this lawsuit was filed in 2016.

7 Importantly for purposes of this motion, your Honor,
8 are two things: First, in the ordinary course of Microsoft's
9 business that SQM data was rolled over such that it only went
10 back 18 months, and because Microsoft had not received prior
11 notice of this patent or the allegations of infringement until
12 the lawsuit was filed, even if the Court were to accept
13 everything that they have said as true and correct --

14 THE COURT: What's the filing date?

15 MR. DAVIS: Filing date of this lawsuit was April of
16 2016.

17 So even if this Court were to accept everything that
18 the plaintiffs have said is true, the data would have only gone
19 back 18 months earlier, because that is the first time
20 Microsoft received notice of these allegations and implemented
21 a litigation hold as soon as it had such knowledge.

22 More importantly, your Honor, is the fact that --

23 THE COURT: October 2013.

24 MR. DAVIS: I'm sorry?

25 THE COURT: Well, from October 2013. You would have

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1 had records up through --

2 MR. DAVIS: '14.

3 THE COURT: From October 2013 forward.

4 MR. DAVIS: '14. Because the lawsuit was in April of
5 2016.

6 THE COURT: Correct, October 2014.

7 MR. DAVIS: So as your Honor aptly noted before we
8 took the lunch break, the hypothetical negotiation in this case
9 the experts agree would have taken place in approximately
10 February of 2011. That data would not have existed in any
11 event within Microsoft because it only went back 18 months from
12 the time the lawsuit was filed.

13 An additional problem that the plaintiffs have is that
14 the data that did exist in that SQM system --

15 THE COURT: Can I stop you? The two aspects for a
16 royalty are rate and unit. When you fix a rate at the
17 beginning of a patent period you don't have units, you just
18 have rate. Units occur over time.

19 So, what you have done is prevent the plaintiff from
20 proving units of damage between the date of the patent of
21 February 2011 and October 2014, roughly three and a half years.

22 MR. DAVIS: I disagree with that, and I would like to
23 explain to the Court why.

24 THE COURT: Is my arithmetic correct?

25 MR. DAVIS: Your arithmetic is correct, yes. May I

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1 continue?

2 THE COURT: Yes.

3 MR. DAVIS: The reason why we disagree with what your
4 Honor has said is because the data in the SQM system did not
5 track usages of scaffolding in Dynamic Data, which is what
6 Mr. Kaufman's expert has accused of infringement.

7 So, in other words, your Honor, even if the data did
8 go back to 2011, it would not have shown usages of scaffolding
9 in Dynamic Data. What that data showed were the times that
10 users opened the Dynamic Data application. And I have an
11 example that I think may be helpful.

12 THE COURT: You're telling me that a subset of that
13 would have been appropriate.

14 MR. DAVIS: I'm not sure what your means by "would
15 have been appropriate".

16 THE COURT: Some of the usages -- if you think of
17 gross and net --

18 MR. DAVIS: Yes.

19 THE COURT: -- the evidence you had was of gross, and
20 from that gross you had to extrapolate a net.

21 MR. DAVIS: I'm not sure I would go that far. I think
22 a better analogy is the following, your Honor:

23 If the patent claims were directed to the example of
24 someone using their ATM card to check their balance, the data
25 that Microsoft had was the number of times that the ATM card

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1 was inserted into the machine. So, in other words, even if
2 Microsoft had had data back to 2011, they would not have been
3 able to divine from that information how many actual usages of
4 scaffolding were included within them. So, for that reason the
5 data they would have gotten even if it existed would not have
6 been relevant, and their expert agrees with that.

7 There is one other --

8 THE COURT: Well, it might not have been material but
9 it would have been relevant.

10 Of all of those insertions of an ATM card, some would
11 have been used for checking balances.

12 MR. DAVIS: You're correct, some of them would have
13 been, and there would have been no way to decide.

14 THE COURT: So if you take the insertions of the ATM
15 card as equivalent to gross, and the number of those that
16 checked balances as net, that would give you the net figure.
17 But you couldn't get to the net figure until you had the gross.

18 MR. DAVIS: In that example your Honor is correct.

19 THE COURT: So a certain number of those SQMs were
20 usages of what is alleged to be infringing.

21 MR. DAVIS: That's correct.

22 THE COURT: And we don't know what proportion.

23 MR. DAVIS: That's correct. And we would not have
24 known whether the data existed or not.

25 THE COURT: So, what would have been the practical

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1 effect in the development of a royalty rate as of February
2 2011? The task would have been made more difficult because the
3 unit of measurement was gross and not net.

4 One way that people have to deal with that is to apply
5 a lower percentage to the higher number of strikes of the SQM.
6 In any event, how many measurements there were of that SQM
7 would be relevant. It may not be dispositive of a problem. It
8 may not have been material in that sense, but it's relevant.
9 And Microsoft has eliminated the relevant evidence. That comes
10 down to the spoliation.

11 MR. DAVIS: I understand what your Honor has said.

12 THE COURT: So the question is how to deal with that.

13 MR. DAVIS: Right.

14 THE COURT: And so one remedy they have is to take the
15 number -- and I didn't know what Google Trends reflected, but
16 as I understand it it's this: They measure in some fashion the
17 number of times people inquire, use -- I don't understand --
18 inquire, I guess -- as to this allegedly infringing process.
19 And they know that number for a certain number of years, but
20 they don't know it for previous years. So a graph is
21 constructed based on what is known to extrapolate back what was
22 potentially in existence. That's what the expert wants to do.
23 I don't know whether you call it Google Trends or anything
24 else, but it's a statistical advice, in effect to draw a
25 parabolic effect.

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1 MR. DAVIS: Your Honor, I understand and agree that
2 that is what their expert wants to do, and because we
3 understand that's what their expert wants to do, we did not
4 move to exclude or prevent him from doing that. What
5 Mr. Patchen --

6 THE COURT: What is it you want to do?

7 MR. DAVIS: I want to be able to cross-examine him.
8 What Mr. Patchen asked for as his second proposed remedy is
9 that when their expert presents that testimony with respect to
10 Google Trends, that we not be allowed -- if I understand him
11 correctly -- that we not be allowed to challenge that use
12 because of this issue that they have raised.

13 THE COURT: What would be the basis of
14 cross-examination?

15 MR. DAVIS: The basis of cross-examination, among
16 other things, would be that the Google Trends data is
17 unreliable. And the reason that we want to make that argument,
18 your Honor, as I said --

19 THE COURT: In what respect? The measurement of the
20 number of instances of inquiry?

21 MR. DAVIS: Right. Because the Google -- the
22 testimony and the evidence in this case is going to show, your
23 Honor, that what the Google Trends data showed was the number
24 of hits on a search term, to simplify --

25 So, for example, what I understand their expert to

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1 have done is to use Google Trends to determine how many people
2 did a search for the term Dynamic Data over, you know, a six or
3 seven year timeframe.

4 THE COURT: I suppose of those who inquired, they
5 inquired to know so they could use, and some subset of that
6 perfected itself in actual use.

7 The problem we have here is that we are searching for
8 some equivalent to compensate for the destruction of
9 information. Almost by definition that which is being proposed
10 to be used is less accurate than actual measurements, and the
11 dilemma for me is how I can have an appropriate remedy for the
12 plaintiff without unjustly penalizing the defendant. So I have
13 to allow you to cross-examine, but I don't know what the end of
14 it is going to be.

15 MR. DAVIS: If I may, your Honor.

16 THE COURT: Because I don't feel I want to tell the
17 jury that the reason that the expert is doing this is because
18 the evidence that would be most relevant has been destroyed.

19 MR. DAVIS: I appreciate that dilemma, your Honor. I
20 guess I would make two points -- one point and perhaps one
21 suggestion.

22 The point is this: Again, I think it's important to
23 keep this in mind. Because the hypothetical negotiation was in
24 2011, they would have had to have done this anyway to get back
25 to that point.

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1 THE COURT: No, they would have determined in 2011, if
2 the record that was being used was not sufficiently accurate,
3 either the rate would have been discounted to some degree or an
4 accurate measurement would have been inserted.

5 MR. DAVIS: The issue, your Honor, is that when they
6 filed the lawsuit --

7 My only point in making that is that when they filed
8 the lawsuit, the data only went back to 2014 under the ordinary
9 course of Microsoft's business. So, if this had never
10 happened, they still would have only had data back to 2014. So
11 to get back to 2011, their expert would have needed to do the
12 same -- presumably would have done the same analysis that he
13 has done now.

14 THE COURT: Would have created a graph the same way.

15 MR. DAVIS: So that was the point that I wanted to
16 make.

17 THE COURT: We would have a trend line. There would
18 be a statistical expert to discuss a trend line.

19 MR. DAVIS: So the related point there, your Honor --
20 and I understand we have raised this -- or this issue came up
21 before we learned today that your Honor was planning to
22 bifurcate the case -- I think this is an issue that doesn't
23 bear on validity or infringement at all.

24 THE COURT: No, it doesn't, but I want to settle it
25 now, because my thought is that the jury would not be given a

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1 break. As soon as it delivered a verdict on validity and
2 infringement, if it were a plaintiff's verdict, it would go on
3 to damages immediately.

4 MR. DAVIS: I understand.

5 THE COURT: So I have to give you a ruling now.

6 What expert do you have on rates, royalty rates?

7 Mr. Abramson?

8 MR. ABRAMSON: What expert do we have?

9 THE COURT: On royalty rates.

10 MR. ABRAMSON: We have a damages expert Brian Dies.

11 THE COURT: What is he going to say?

12 MR. ABRAMSON: On the royalty rate he is going to talk
13 about a hypothetical negotiation. He is going to talk about a
14 hypothetical negotiation in 2011 based on anticipated usage
15 from that date going forward.

16 THE COURT: And is customarily royalty rate adjusted
17 if the usage is more or less than that which is projected?

18 MR. ABRAMSON: It certainly enters into the
19 calculation, absolutely.

20 THE COURT: Is there any way to stipulate to this
21 information?

22 MR. ABRAMSON: To stipulate to which information?

23 THE COURT: Well, that which we're talking about. The
24 reasonable equivalent to that which Microsoft would have had.

25 MR. ABRAMSON: I would expect there would be a

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1 substantial disagreement about that for the same reason that
2 they challenge our expert analysis. I mean their report had in
3 it --

4 THE COURT: Now, damages have to be proven as any
5 other proposition of fact has to be proven.

6 MR. ABRAMSON: And we are prepared to do that.

7 THE COURT: What Mr. Davis wants to do is to impeach
8 the accuracy of the information that you're using for damages,
9 not having you allowed to use more accurate information.

10 He would have had an argument in the beginning that
11 the information that exists is not sufficient, but that would
12 have been overcome.

13 I'm going to make this as sort of a tentative ruling,
14 that Mr. Davis can cross-examine the expert, but in so far as
15 the expert's testimony is impeached on the basis that it is not
16 sufficiently accurate, I'm going to have to figure out a way to
17 tell the jury that the more accurate information does not exist
18 because it had been destroyed by Microsoft.

19 MR. ABRAMSON: Your Honor, we think that would be an
20 appropriate approach.

21 THE COURT: I know you like that, Mr. Abramson.

22 MR. ABRAMSON: Yeah. And I think that the rules --

23 THE COURT: I'm not really happy with it.

24 MR. ABRAMSON: I think the rules --

25 THE COURT: I'm not really happy with it.

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1 MR. ABRAMSON: I understand, your Honor. I think the
2 rules do contemplate such a remedy. If you look at the
3 commentary to the Federal Rules on this topic -- is it Rule 37?
4 Rule 37.

5 THE COURT: Is there any way for me to take damages as
6 a judge issue and not a jury issue?

7 MR. ABRAMSON: If the parties agreed to it.

8 THE COURT: Yeah, that's really my question.

9 MR. ABRAMSON: I don't think we would -- I don't think
10 we would be inclined to agree to that.

11 THE COURT: The rule also, Mr. Abramson, is that you
12 are entitled to royalties not for the entire process but only
13 for the part of the process that's infringed.

14 So, a royalty rate that might be available for the
15 entire process would not be the same; it would be larger than
16 the royalty rate for the part of it that is the invention.

17 MR. ABRAMSON: Well, your Honor, our expert factored
18 that into his analysis very consciously, of course. You're
19 only going to get entitled to remuneration for the value of the
20 technology that's in their actual infringement. That's
21 understood, and that was taken into -- that was taken into
22 account in his report.

23 I think, you know, Mr. Davis also had some arguments
24 here about what does and what doesn't infringe, and I think we
25 would disagree with some of that. It's not so clear that some

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1 of those downloads would not necessarily have infringed. There
2 are issues there of fact there as well. It's not as --

3 THE COURT: I'm going to resolve this now. I don't
4 think I'm getting more light on the subject.

5 I'm going to rule that -- and it's tentative -- that
6 Mr. Davis can cross-examine the expert to show the weaknesses
7 of the expert's analysis but -- as I believe the instruction to
8 the jury will be -- when that is the best available evidence
9 that can be taken as appropriate evidence to prove damages. I
10 don't remember the exact terminology but it's something like
11 that. And that's what I guess I will be charging.

12 OK, that motion is finished, it's granted, to the
13 extent I granted it and denied it to the other extent.

14 MR. ABRAMSON: Thank you, your Honor.

15 MR. DAVIS: Your Honor, if I may, there was a related
16 motion in limine that we had filed. I think effectively your
17 Honor has ruled on that, but just for the record that was
18 Microsoft's motion in limine number 22, I believe.

19 THE COURT: Let me go down in order.

20 So we finished with Kaufman's motions 1 through 3.
21 Microsoft's motion 1 moves to preclude Kaufman from arguing
22 that his Schemalive product practices the asserted claims. I
23 have ruled on that. That motion is granted.

24 Microsoft motion 2 moves to exclude mention of alleged
25 spoliation. I'm going to reserve on that and rule at the end

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1 of the direct examination.

2 MR. DAVIS: Your Honor, with respect to reserving in
3 direct examination, you mean the direct examination of the
4 damages expert?

5 THE COURT: Yes.

6 MR. DAVIS: Right. So as it relates to the liability
7 phase of the trial --

8 THE COURT: -- there won't be damages. We're not
9 getting into that.

10 MR. DAVIS: Thank you.

11 THE COURT: Microsoft motion 3 moves to exclude
12 evidence of Microsoft's knowledge of prior Kaufman
13 publications. That's the willful infringement claim.

14 MR. DAVIS: Correct.

15 THE COURT: And I've ruled on that, so the motion is
16 granted.

17 It's not relevant to anything about infringement or
18 validity.

19 Microsoft motion 4 moves to exclude reference to the
20 outcome of the inter partes review. That's granted.

21 All right. I think that deals with all the in
22 limines. Give me a moment to reorganize.

23 Going to the pretrial order. Let's talk first about a
24 number of generalities.

25 The first phase will be validity and infringement.

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1 Now, theoretically and analytically a plaintiff can prove his
2 case by resting on the presumption of validity and going
3 directly to infringement. I suspect that's not your plan,
4 Mr. Abramson.

5 MR. ABRAMSON: That's correct, your Honor.

6 THE COURT: Tell us your plan.

7 MR. ABRAMSON: I'm sorry?

8 THE COURT: What is your plan?

9 MR. ABRAMSON: We're going to proceed --

10 THE COURT: You're going to go first.

11 MR. ABRAMSON: We're going -- yes, I think our plan is
12 that we have a presumption of validity, absolutely, and then
13 we're going to proceed with ownership of the patent and the
14 fact that Microsoft --

15 THE COURT: That's not challenged, is it?

16 MR. ABRAMSON: Pardon me?

17 THE COURT: Ownership is not challenged.

18 MR. ABRAMSON: Ownership is not challenged. We're
19 going to proceed with proof of infringement.

20 THE COURT: Well, are you going to have Mr. Kaufman as
21 your first witness?

22 MR. ABRAMSON: Yes, Mr. Kaufman will be the first
23 witness.

24 THE COURT: So, what is he going to talk about? Is he
25 going to talk about issues of validity also, about what the

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1 prior art was and how he thought his invention was something --

2 MR. ABRAMSON: Yes, as background. We will save for
3 cross-examination and rebuttal such evidence as is submitted by
4 the defendant, to try to establish the defense of invalidity.
5 So, that's how we would handle that. So, Mr. Kaufman would
6 review the prior art in his efforts and development as
7 background for what his invention was, how it was done.

8 THE COURT: He would not be testifying as to the
9 issues of infringement.

10 MR. ABRAMSON: Sorry?

11 THE COURT: He would not be testifying in any way
12 evaluating what the defendant did.

13 MR. ABRAMSON: He is not going to express opinions on
14 it. He is going to present it. He is going to present the
15 factual -- he is going to present the factual basis upon which
16 the expert, Professor Shasha, will address -- Professor Shasha
17 will be the one who compares the features of the claims against
18 the accused.

19 THE COURT: So essentially you have two witnesses.

20 MR. ABRAMSON: Yes. And the coinventor, Micah
21 Silverman, will also appear briefly to explain his role.

22 THE COURT: OK.

23 MR. ABRAMSON: And then after that our expert will go
24 through the infringement analysis and also some foundation.
25 Well, I guess foundation as to damages is out now.

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1 THE COURT: So, Mr. Davis, having heard this so far,
2 any comments?

3 MR. DAVIS: I do, your Honor. That's just the concern
4 about Mr. Kaufman offering what sounds like expert -- what is
5 going to run right up to the line -- if not cross the line --
6 for expert testimony.

7 THE COURT: You will be objecting, won't you?

8 MR. DAVIS: Yes, I will.

9 THE COURT: Well, I can rule on it at that time, but
10 he is not here as an expert.

11 Incidentally, I will just break in. Objections are
12 made by standing and saying "objection". There is no
13 explanation of objections. Unless I ask for it -- and I will
14 ask for it -- if I do -- generally at a side bar. You can ask
15 for side bars, but it's not likely I will be giving them. If I
16 understand the issue, I will rule, and we will keep on going
17 with the trial. I think side bars are very disruptive to a
18 jury and I try to minimize their use.

19 MR. DAVIS: Can I ask for clarification, your Honor?
20 For issues that we might want to just get our objection on the
21 record preserved, but to make sure that we are sticking to your
22 Honor's rules, would your preference be that the first time
23 that we are outside of the presence of the jury we just state
24 that on the record?

25 THE COURT: No, just say "objection". You don't need

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1 to do anything more. You're strongest, if there is an
2 appellate issue, if you just say objection and I make a
3 mistake.

4 MR. DAVIS: OK, I understand. The only reason I ask
5 that question, I'm not quite sure what your Honor is aware of
6 the basis of the objection.

7 THE COURT: Generally I can figure it out.

8 MR. DAVIS: I mean if the objection is it's beyond the
9 scope of the report, for example, your Honor might not be
10 immediately aware of that.

11 THE COURT: Well, I will figure it out.

12 MR. DAVIS: Thank you.

13 THE COURT: All right. Then it will be Mr. Davis'
14 turn, and you will be proving -- you will be denying
15 infringement, and you will be starting to prove the issues of
16 validity.

17 MR. DAVIS: That's correct.

18 THE COURT: Invalidity.

19 MR. DAVIS: That's correct.

20 THE COURT: And then I guess there will be rebuttal if
21 necessary.

22 MR. ABRAMSON: Yes.

23 THE COURT: I am a little confused in terms of what
24 kind of scope there will be on the rebuttal case with regard to
25 validity.

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1 MR. ABRAMSON: I think there could be considerable
2 rebuttal.

3 THE COURT: So, if there is considerable rebuttal,
4 I've got to give Mr. Davis additional time at the end to in
5 effect finish up and do a reply.

6 Now, you have given me a time. Are you comfortable
7 with the time that you've given me?

8 MR. ABRAMSON: You mean number of hours?

9 THE COURT: Yes.

10 MR. ABRAMSON: It might be a little tight. It might
11 be a little tight, because if those hours cover both the
12 liability and damages phase, it could be a little tight. But I
13 think --

14 THE COURT: Then suppose we limit it to liability and
15 infringement.

16 MR. ABRAMSON: Pardon me?

17 THE COURT: We limit the time estimates --

18 MR. ABRAMSON: Then I think that's adequate.

19 THE COURT: -- to the issues of the first phase of the
20 trial, liability and infringement -- validity and infringement.

21 MR. ABRAMSON: I think 16 hours is adequate.

22 THE COURT: And that starts with the opening and goes
23 right through the closing.

24 MR. ABRAMSON: Yes, per side.

25 MR. DAVIS: Your Honor, obviously if that is the

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1 Court's order, we will abide by that. We actually agreed to 16
2 hours expecting that that would be both liability and damages.
3 We think it's more than that.

4 THE COURT: I'm likely to give you both a little more
5 time because I think it's going to be difficult getting the
6 jury to understand this patent.

7 That was the next question. How will you educate the
8 jury with regard to the patent?

9 MR. ABRAMSON: Well, Mr. Kaufman gave the tutorial
10 here at the outset, and I think he is very capable of doing
11 that.

12 THE COURT: He can do that in his proof by asking him
13 questions and having him answer?

14 MR. ABRAMSON: Yes, because it's relevant to how he
15 came up with this invention, how he implemented it.

16 THE COURT: The jury has to measure infringement
17 against the claims, so it's necessary for the jury to
18 understand not only the overall concept and not only what he
19 had in mind in relationship to what he thought was an invention
20 but also with respect to the specific claims. And he cannot
21 give a tutorial. He is a witness. He is a fact witness, and
22 that steps out of his role as a fact witness.

23 You have to give the tutorial.

24 MR. ABRAMSON: I'm perfectly giving the tutorial, your
25 Honor. I mean I can, and I am happy to do it.

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1 THE COURT: Why don't you as part of your opening --
2 or, better still, we will count this -- yes, it's part of your
3 opening.

4 Show the patent to the jury, take the jury through the
5 patent, explain it, go through the terms, go through the
6 Markman definitions. And then in his opening Mr. Davis will
7 counter that to whatever extent he thinks appropriate.

8 Mind you, objections are appropriate during openings.
9 I know some judges take a dim view of objections during opening
10 and summations. I do not. If you have an objection, make
11 them.

12 Is that satisfactory, Mr. Davis?

13 MR. DAVIS: My expectation was that the ordinary
14 course of things would be that their expert would do that.
15 Yes, it's satisfactory provided that we're not going to have
16 Professor Shasha get up a day later or a day and a half later
17 and just completely redo everything that Mr. --

18 THE COURT: No, it won't be appropriate for him to
19 repeat.

20 MR. ABRAMSON: He will not, your Honor.

21 THE COURT: The patent is Exhibit 1 in evidence in
22 effect, and we start from that. And when you're putting in an
23 exhibit, you can show the exhibit to the jury and take them
24 through it. And I would like you to do that, Mr. Abramson, so
25 the jury understands.

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1 MR. ABRAMSON: OK.

2 THE COURT: This is a great challenge for me. It's
3 the first patent case that I've tried, and I don't think there
4 has been much experience in the court with patent cases tried
5 to a jury.

6 I have a very strong belief that the jury can and must
7 understand everything that goes into the trial. It's my job to
8 make sure that that happens, and I'm delegating that
9 responsibility to both of you so the jury understands what it
10 is we're talking about.

11 I do not want the jury to make rulings on the basis of
12 some ill-conceived and ambiguous notion of what a patent is or
13 what is involved here. So, it's a challenge to you.

14 With respect to the potential infringement, that's all
15 going to be experts, but with the patent itself I think both of
16 you are capable of doing that.

17 MR. DAVIS: Your Honor, if I may, in almost all of the
18 patent trials that I have been a part of, in order to aid the
19 jury we have prepared binders that contain at least a copy of
20 the patent and the list of claim constructions so that at the
21 time --

22 THE COURT: Would you please combine and agree to the
23 binder that you give to the jury?

24 MR. DAVIS: Yes, sir, we can do that.

25 THE COURT: And that binder will stay with the jury

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1 throughout.

2 MR. ABRAMSON: Yeah. I mean it should not be
3 argumentative; it should be straightforward, no spin to it.

4 THE COURT: Right, right.

5 MR. DAVIS: The other thing that I would --

6 THE COURT: I won't say anything about sting, but no
7 spin.

8 MR. ABRAMSON: No spin.

9 MR. DAVIS: The other thing I would raise -- I'm not
10 sure your Honor is aware of this -- but the Federal Judicial
11 Center also has a video that they have made.

12 THE COURT: I have seen the video; it's not to be
13 played.

14 MR. DAVIS: Thank you.

15 THE COURT: I don't care for the video.

16 How do you present exhibits? Is it going to be on a
17 screen?

18 MR. ABRAMSON: We have hard copies of the exhibits,
19 and we also are prepared to present them on the screen. I
20 noticed that there are screens --

21 THE COURT: The jury has screens.

22 MR. ABRAMSON: I don't know where the screen is in the
23 courtroom. Is that it, or is there another one?

24 THE COURT: We have a screen. We have a screen, and
25 people can access the screen through computers or through the

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1 Elmo.

2 MR. ABRAMSON: OK. So we have a screen, a projector
3 and an Elmo, and I think that would be fine.

4 The other question is publishing things to the jury.
5 I guess that system does that to some extent.

6 THE COURT: There is in effect one screen for two
7 jurors. You can go look at it. Have a look.

8 MR. ABRAMSON: I saw it. I took a look at it before.
9 It's pretty hard to see, I think, for two jurors. They are
10 relatively small screens.

11 THE COURT: I can't do better than that.

12 Bridget, we are talking about the presentation of
13 evidence. We have a screen, right? Yes. We have a screen and
14 you can access the screen either from your computers or through
15 an Elmo. You should work through what you are going to be
16 doing with the technician in the court.

17 DEPUTY COURT CLERK: It's 805-0134.

18 THE COURT: Make sure it's set up. I have used that
19 in many cases -- used the system in many cases -- and the
20 jurors have no problem in seeing what they have to see.

21 MR. ABRAMSON: The binder you referred to, is that
22 something you would make a copy for every juror?

23 THE COURT: No, you don't have to do any copies at
24 all. You don't have print. You don't have to publish anything
25 or distribute anything. It's on the screen and it's on their

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1 screens and my screen.

2 MR. DAVIS: I'm sorry, I think the question that I
3 thought Mr. Kaufman -- the question I think Mr. Abramson was
4 asking about was the binders that we are going to agree to give
5 the jury.

6 THE COURT: Only the patent and the patent
7 construction.

8 MR. DAVIS: Right. And so we will give each -- at
9 least with the Court's permission, we will give each one of the
10 jurors a binder that has those two things in it.

11 THE COURT: Correct.

12 MR. ABRAMSON: That's what I was asking.

13 THE COURT: Correct.

14 MR. DAVIS: OK. And in terms of --

15 THE COURT: And the exhibits themselves as they come
16 in, they will be premarked -- they have already been
17 premarked -- and you will present them through the screens.

18 MR. ABRAMSON: What I had in mind was the binder that
19 we're going to meet and confer on, everybody gets that. The
20 rest of them are published through the screens and presumably
21 go into the jury room for deliberations.

22 THE COURT: Exhibits will not go in to the jury unless
23 they ask for it, but you will have them ready to present. And
24 those hard copies will be better in that sense.

25 MR. DAVIS: If I may, your Honor --

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1 THE COURT: The jurors will each have notebooks, and
2 so they will take their notes, and they can take their notes
3 into the deliberation room, and if they want something, they
4 know how to call for it.

5 MR. DAVIS: On behalf of Microsoft, your Honor, our
6 expectation was that we will be using a trial presentation
7 system to present the evidence electronically.

8 We also would -- with the Court's permission --
9 typically follow a practice whereby on direct and
10 cross-examination we would have a hard copy binder of the
11 exhibits that we intend to use so that the Court and the
12 witness and counsel would have at their fingertips.

13 THE COURT: I read what you proposed in the pretrial
14 order, and I approve it.

15 OK. I am looking at the bottom of page 9 of the
16 pretrial order. The jury will not be given copies of discovery
17 responses. Counsel can read what is an admission into
18 evidence. To that extent the bottom paragraph is modified.
19 It's not clear to me what you want to use with deposition
20 evidence in addition to live testimony.

21 MR. ABRAMSON: We have certain evidence -- well, we
22 have certain evidence -- documents, for example -- from
23 Microsoft that would come in. It has to come in through
24 somebody, and that would be the vehicle.

25 THE COURT: What documents? By nature of admissions,

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1 you mean?

2 MR. ABRAMSON: Yes, absolutely.

3 THE COURT: So there is no dispute as to authenticity.

4 MR. ABRAMSON: Not on those, I don't believe so.

5 THE COURT: You can present it as an exhibit.

6 MR. ABRAMSON: Yeah. Normally I would want to have a
7 witness to put it in through.

8 THE COURT: Why? Who could be a witness to that? A
9 lawyer?

10 MR. ABRAMSON: In some cases the person who wrote the
11 document or who otherwise authenticated it during the
12 deposition.

13 THE COURT: If it's a witness, then the witness comes
14 in and the normal rules of witnesses apply. If it's an
15 admission, you can put it in yourself. But you don't need
16 someone on the stand for admission.

17 MR. ABRAMSON: If the Court will accept us just
18 offering documents as admissions, then we could probably -- I
19 understand we can eliminate the deposition, but we can limit
20 it.

21 THE COURT: I'm not prepared to do that. I don't know
22 what you have in mind. I can't really rule on that.

23 Before we get into the exhibits --

24 MR. ABRAMSON: I mean some of the deposition
25 testimony, the oral testimony at the deposition, is also in the

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1 nature of admissions.

2 THE COURT: Let me be clear on this. If there is a
3 live witness, there is no deposition testimony.

4 MR. ABRAMSON: Understood.

5 THE COURT: However, that which is admitted by the
6 party can come in separately. You and Mr. Davis will put that
7 into evidence. You will say page so and so, line so and so,
8 the following is offered as an admission of the party, and you
9 will offer it.

10 MR. ABRAMSON: That's exactly what we have in mind.

11 THE COURT: OK. Mr. Davis?

12 MR. DAVIS: Yes, sir. Your Honor, with respect to
13 cross-examination, our expectation was that we would probably
14 have in reserve impeachment clips as necessary that we would
15 play by video if we needed to, and my understanding --

16 THE COURT: You can present the video to the witness.
17 There is a screen.

18 MR. DAVIS: And my understanding -- based on an
19 earlier transcript that I saw from your Honor -- is that what
20 your Honor would like is for us to first hand up the written
21 transcript so that your Honor can confirm that it's proper
22 impeachment, and then we can play the video? Correct?

23 THE COURT: Correct.

24 MR. DAVIS: Thank you.

25 MR. ABRAMSON: And Mr. Patchen reminds me that we do

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1 have a few video clips of Microsoft witnesses that we would
2 want to play -- people who are not appearing here live.

3 THE COURT: People who are not appearing.

4 MR. ABRAMSON: Yes.

5 THE COURT: And you want them as witnesses.

6 MR. ABRAMSON: Yes.

7 THE COURT: Their entire testimony.

8 MR. ABRAMSON: For certain clips from their deposition
9 testimony.

10 THE COURT: And offering them as what? Testimony? Or
11 as admissions?

12 MR. ABRAMSON: Testimony that provides admissions.

13 THE COURT: Is this testimony as to something that a
14 witness saw, or heard, or did?

15 MR. ABRAMSON: Yes.

16 THE COURT: OK, so you put it in. It's almost as if
17 that person is here.

18 MR. ABRAMSON: Pardon me?

19 THE COURT: That person can't come to the trial.

20 MR. ABRAMSON: If that person can't come to the trial.

21 THE COURT: You want the person here?

22 MR. ABRAMSON: If the person is here, we could --

23 THE COURT: Have you asked Mr. Davis to produce him?

24 MR. ABRAMSON: We have asked.

25 THE COURT: Mr. Davis?

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1 MS. EDELMAN: We haven't received any trial subpoenas,
2 your Honor, for specific witnesses. They have not specifically
3 asked us to present any witnesses in person.

4 THE COURT: Live witnesses are much preferred.

5 MR. DAVIS: Thank you, your Honor. So what we have
6 agreed to in advance is that Microsoft was intending to bring
7 to the trial at least Mr. Groff and Mr. Hunter, and I believe
8 those were on counsel's list.

9 THE COURT: Why don't you just talk together. If
10 there is any dispute, bring it to me. Otherwise --

11 MR. DAVIS: Yes, sir.

12 MS. EDELMAN: One related issue I would raise with the
13 videos. And maybe I'm off base, thinking of something else.
14 But there were some videos played during the depositions of
15 Microsoft witnesses, and those videos I believe also appear in
16 the exhibit list, and I just want to clarify that --

17 THE COURT: They're not exhibits. They're not
18 exhibits. They can use them in the cross-examination.

19 MS. EDELMAN: OK. OK.

20 THE COURT: And if it's an admission, we don't need
21 pictures; we can just read it in from a transcript.

22 MS. EDELMAN: Thank you, your Honor.

23 THE COURT: OK.

24 MR. DAVIS: Pardon me, your Honor, while thinking
25 about it, is it the Court's practice to submit to the jury

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1 trial testimony -- if it's requested -- in written form?

2 THE COURT: When they're deliberating?

3 MR. DAVIS: Yes, sir.

4 THE COURT: If they ask for certain testimony to be
5 reread, generally I will have the reporter reproduce the pages
6 that are involved -- without objections and the like -- counsel
7 will review them and then they will go to the jury.

8 MR. DAVIS: Understood.

9 THE COURT: Yes, Mr. Abramson? You're just
10 stretching?

11 MR. ABRAMSON: Yes.

12 THE COURT: All right. What do you want me to do with
13 the objections?

14 MR. ABRAMSON: Well, we have a long list of
15 objections. I don't know whether your Honor wants to go
16 through them today or reserve them as they come up.

17 THE COURT: I'd rather reserve them as they come up,
18 unless there is some principal that you want me to deal with
19 now.

20 MS. EDELMAN: Nothing from Microsoft. And we expect
21 that in light of your Honor's rulings today that many of the
22 exhibits and their objections would come out.

23 THE COURT: OK, so I don't need to do anything for
24 this.

25 MS. EDELMAN: No, our preference would be to deal with

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1 them as they would come up with the respective witnesses that
2 they would be brought in through.

3 THE COURT: That's fine.

4 Avoid duplication of exhibits, please. Have you done
5 that?

6 MR. ABRAMSON: We have tried. We have made an effort.

7 THE COURT: I'm going to sign the pretrial order. Do
8 you have the original? And Ms. Jones will file it.

9 I'm going to file this one.

10 There will be eight people on the jury. We will have
11 an array of 14. I have your proposals for voir dire, and we
12 will go through them.

13 I will ask the questions. If a person cannot sit,
14 another person will replace that juror. And I will ask the
15 juror who is replacing if there are any answers that he wishes
16 to give me to any of the questions that I've asked. If there
17 are, I will take them up, and we will make challenges for cause
18 as we go along.

19 At the end of this process there is a questionnaire
20 that is given that will address personal items: Where were you
21 born? Where do you live? Who is in your household? What
22 education you've had? What jobs you've had? What magazines do
23 you read? What do you watch on the Internet? So on. And then
24 you will exercise your peremptories at your seat, three
25 peremptories each side. You will give me the challenges on a

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1 note paper -- one from each side -- and then we will go into
2 the jury room and strike those who have been stricken. If you
3 don't exercise all your peremptories or you coincide with your
4 exercise peremptories, I will excuse the highest numbered
5 backwards until we have a jury of eight, and that will be the
6 jury.

7 MR. DAVIS: Your Honor, is it the Court's practice to
8 provide counsel with the list of the venire before the jury
9 selection begins?

10 THE COURT: No.

11 MR. DAVIS: Thank you.

12 MR. ABRAMSON: It leaves room for the possibility to
13 lose two jurors?

14 THE COURT: Can't hear you.

15 MR. ABRAMSON: That leaves the possibility to lose two
16 jurors.

17 THE COURT: That's right.

18 MR. ABRAMSON: What about cause? Challenges?

19 THE COURT: There are no alternates. As you challenge
20 for cause and it's granted, or a juror can't sit, another juror
21 from the overall array comes in here and fills the seat.

22 MR. ABRAMSON: All eight jurors --

23 THE COURT: Ms. Jones, how many people will you call,
24 I think?

25 DEPUTY COURT CLERK: I called 25.

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1 THE COURT: We have 25 people. I think we need a few
2 more because it's going to be a month trial. It will go Monday
3 through Thursday. I have my overall calendar on Friday. We
4 will go 10 o'clock to 5 o'clock. There will be a midmorning 15
5 minute break, something like that. Lunch is around one o'clock
6 for an hour and 15 minutes. Usually jurors can dispense with
7 the afternoon break. And we will go as close to as close to
8 five as we can. Ms. Jones will keep the time and let you know
9 as we go along.

10 Your time estimate seems suitable to me, but priority
11 number one is to ensure that the jurors understand the case.
12 If you need more time, we will take it. We are going to have
13 30 people come up.

14 MR. ABRAMSON: Any expectation as to how far we will
15 get the first day?

16 THE COURT: You should be prepared to put on your
17 first witness -- do the openings first. And then you have the
18 claims construction, so it's not likely that we will have a
19 witness on for the first day.

20 All right. I think I have said everything I need to
21 say. Any questions, Mr. Abramson?

22 MR. ABRAMSON: No questions, your Honor.

23 THE COURT: Mr. Davis?

24 MR. DAVIS: None, your Honor.

25 THE COURT: I look forward to seeing you then.

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1 MR. ABRAMSON: Thank you.

2 MR. DAVIS: Thank you, your Honor.

3 THE COURT: Can I get an agreed set of facts from you?

4 MR. ABRAMSON: Pardon me?

5 THE COURT: Can I get an agreed set of facts?

6 MS. EDELMAN: Yes, your Honor, they were in the
7 pretrial order.

8 THE COURT: We have it, OK. I might shorten it. And
9 I am not planning to give an elaborate set of preliminary
10 instructions. I think all I need to say is that there are
11 going to be two phases to this trial -- the opening part of
12 this trial -- which will examine the validity of the patent and
13 whether or not the patent was infringed. So plaintiff has the
14 burden of proving infringement by a preponderance of the
15 evidence -- and I will explain what a preponderance of the
16 evidence is -- and defendant has the burden of proving that the
17 patent is invalid by clear and convincing evidence. And I will
18 attempt to define that.

19 And I will tell them that we start with a presumption
20 of validity, but if the defendant puts in evidence to question
21 that, the presumption disappears, and the defendant must then
22 be judged by whether he has proven his case by clear and
23 convincing evidence. And then we start. OK.

24 MR. ABRAMSON: Thank you.

25 THE COURT: Are any of your defenses to be tried to

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1 the judge and not to a jury? Mr. Davis? Like estoppel, for
2 example, is that really going to be --

3 MS. EDELMAN: Your Honor, there are some defenses that
4 may be more appropriate for your Honor including estoppel.

5 THE COURT: I think we will deal with that in the
6 closing conference.

7 MS. EDELMAN: Yes, your Honor.

8 THE COURT: We will have a conference at the end of
9 the case to go over the charge, and then we will carve out what
10 we need to carve out at that point.

11 That's it. Thanks very much.

12 (Adjourned)